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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 95-92
Regulations Governing Programming	)	
Practices of Broadcast Television	)	
Networks and Affiliates	)	
	)	
47 C.F.R. § 73.658(a), (b), (d), (e) and (g)	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: June 15, 1995; Released: June 15, 1995

Comment Date: August 28, 1995
Reply Comment Date: September 27, 1995

By the Commission:

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I. INTRODUCTION

1. With this Notice of Proposed Rule Making (Notice), the Commission continues its reexamination of the rules governing the relationship between broadcast television networks and their affiliates. The five rules under consideration here, which are included in Section 73.658 of the Commission's Rules, 47 C.F.R. § 73.658, all regulate particular network/affiliate programming practices and apply to all broadcast television networks.[1] The five rules are: (1) the right to reject rule (Section 73.658(e)); (2) the time option rule (Section 73.658 (d)); (3) the exclusive affiliation rule (Section 73.658(a)); (4) the dual network rule (Section 73.658(g)); and (5) the network territorial exclusivity rule (Section 73.658(b)).[2] The right to reject rule provides that affiliation arrangements between a broadcast network and a broadcast licensee generally must permit the licensee to reject programming provided by the network. The time option rule prohibits arrangements

[1] Network or "chain" broadcasting is defined by Section 3(p) of the Communications Act as "simultaneous broadcasting of an identical program by two or more connected stations." 47 U.S.C. § 153(p).

[2] The Commission previously sought comment regarding the dual network rule in its television ownership proceeding. See Notice of Proposed Rule Making in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992). We incorporate comments we received on that issue into this proceeding, and we seek further comment in Section IV-D, infra.

whereby a network reserves an option to use specified amounts of an affiliate's broadcast time. The exclusive affiliation rule prohibits arrangements that forbid an affiliate from broadcasting the programming of another network. The dual network rule generally prevents a single entity from owning more than one broadcast television network. The network territorial exclusivity rule proscribes arrangements whereby a network affiliate may prevent other stations in its community from broadcasting programming the affiliate rejects, and arrangements that inhibit the ability of stations outside of the affiliate's community to broadcast network programming.[3]

2. The Commission has examined the network/affiliate relationship a number of times over the years, although it has not conducted a comprehensive review since 1980. It first did so in its 1941 Report on Chain Broadcasting.[4] That report expressed the Commission's general concern that the major radio networks' power over their affiliates was impeding the development of new program sources and impairing the affiliated stations' ability to control their day-to-day operations. As a result of the findings of the Report on Chain Broadcasting, the Commission adopted a number of rules prohibiting or limiting certain practices between radio networks and their affiliates, including the practices covered by the five rules that will be discussed in this Notice. The rules adopted for the radio industry pursuant to the Report on Chain Broadcasting were applied to television in 1946 without additional analysis or comment.[5] A number of years later, the Commission appointed a staff committee headed by Roscoe L. Barrow, which conducted a general inquiry

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[3] The Commission is currently examining or has recently completed review of a number of other network rules. See Notice of Proposed Rule Making in MM Docket No. 95-90, FCC 95-266 (released June 14, 1995) (reexamination of network control of station rates and network advertising representation rules); Notice of Proposed Rule Making in MM Docket No. 95-40, FCC 95-145 (released April 5, 1995) (reexamination of rule requiring filing of affiliation contracts); Notice of Proposed Rule Making in MM Docket No. 95-39, FCC 95-144 (released April 5, 1995) (review of the financial interest and syndication rules); Report and Order in MM Docket No. 91-221, FCC 95-97 (released March 7, 1995) (repealed the network station ownership rule and the secondary affiliation rule); Notice of Proposed Rule Making in MM Docket 94-123, FCC 94-266 (released October 25, 1994) (reexamination of the prime time access rule).

[4] Report on Chain Broadcasting, Commission Order No. 37, Docket No. 5060 (May 1941), modified, Supplemental Report on Chain Broadcasting (October 1941), appeal dismissed sub nom. NBC v. United States, 47 F.Supp. 940 (S.D.N.Y. 1942), aff'd, 319 U.S. 190 (1943).

[5] Amendment of Part 3 of the Commission's Rules, 11 Fed. Reg. 33 (Jan. 1, 1946).

into television network broadcasting and culminated in the 1957 Barrow Report.[6] The Barrow Report voiced continued concerns over the networks' ability to extract certain agreements from their affiliates. As a result, the Commission adopted additional restrictions on network/affiliate practices, including a more restrictive version of the time option rule than the one that had previously been in place.[7]

3. In 1977, the Commission repealed almost all of its network rules with respect to radio, including four of the five rules at issue in this Notice.[8] The Commission cited major changes in the character of network radio since 1941, including a tremendous increase in the number of stations, the diminished economic role of radio networks, and a change in the type and duration of programming provided by radio networks. That same year, the Commission again created a staff study group to examine, among other things, the effectiveness of the existing television network/affiliate regulations. The resulting Network Inquiry Report, issued in 1980, found that a number of Commission rules and policies had unintentionally increased the economic power of the three major national television networks by enhancing their ability to exclude potential competitors.[9] As a result, the Network Inquiry Report suggested elimination of most of the network/affiliate rules. The Commission took no action on the recommendations of the staff Report.

4. More than 50 years have passed since the Report on Chain Broadcasting was issued. At that time, television was in its infancy and radio was the broadcast medium of mass national appeal. The broadcasting industry has undergone tremendous change in the intervening decades, yet four of the five rules we discuss in this Notice have remained substantially unchanged since that time. The rule that was changed, the time option rule, was modified over 30 years ago to impose additional restrictions. Moreover, it has been 15 years since release of the Network Inquiry Report questioning whether these rules serve the public interest. In those 15 years, many have argued that the need to diminish the broadcast networks' power over program production and distribution has been reduced by the emergence of cable television and other alternative program distributors as vigorous

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[6] Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (Oct. 1957), reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Congress, 2d Sess. (1958) (Barrow Report).

[7] See Second Report and Order in Docket No. 12859, 34 FCC 1103 (1963).

[8] Report, Statement of Policy, and Order in Docket No. 20721, 63 FCC 2d 674 (1977). The Commission decided to retain the network territorial exclusivity rule for radio (47 C.F.R. § 73.132).

[9] Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report (Oct. 1980) (Network Inquiry Report).

competitors to broadcast television for viewers and advertisers.[10] Further, the importance of protections for affiliates vis-a-vis their networks appears diminished by the availability of an ever-growing supply of alternative programming. We believe that this continuing realignment of the market for delivered video programming necessitates a comprehensive reevaluation of the five network/affiliate rules that are the subject of this Notice.

5. The overarching theme of our analysis is whether the rules continue to serve the purposes for which they were developed, which were themselves rooted in the Commission's primary goals of promoting competition and diversity in the communications industry. To answer this question, this Notice first examines the general reasons behind the five network rules. We then discuss the dynamics of the network/affiliate relationship, with an eye towards identifying changes in that relationship that may have alleviated concerns regarding potential abuse of power by the major broadcast networks. Next, keeping in mind these two analyses, we examine each of the five rules to understand how each was specifically designed to accomplish the Commission's broad goals and to ascertain whether the rule at issue in fact achieves its objectives, and we propose modifications as appropriate. Finally, we raise questions about the cumulative effects of our proposed actions.

II. GOALS OF THE NETWORK/AFFILIATE RULES

6. At the time of the Report on Chain Broadcasting, the networks were including provisions in their affiliation agreements that were viewed by the Commission as inhibiting the development of competition by new networks and restricting licensees' control over their stations. Most of the rules adopted in the Report on Chain Broadcasting were based on either or both of the following specific goals:

(1) To remove barriers that would inhibit the development of new networks;

(2) To ensure that licensees retain sufficient control over their stations to fulfill their obligation to operate in the public interest.

Both goals serve the Commission's general objectives of maximizing diversity of viewpoint and encouraging competition in the communications industry. The first goal was based on a belief that new television networks would provide viewers with more programming choices, and that new networks would compete with existing networks for advertisers and viewers, providing consumers with the economic benefits of a competitive marketplace. The second goal was premised on the requirement of the Communications Act that licensees retain

[10] See F. Setzer and J. Levy, Broadcast Television in a Multichannel Marketplace, FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3966 (1991) (OPP Paper).

control over their stations,[11] which is the basis of the Commission's ownership and attribution framework for ensuring diversity and competition.

7. Furtherance of diversity and competition remains the cornerstone of Commission regulation. The two specific goals upon which the rules are based accordingly continue to be relevant in today's marketplace. The question arises, however, whether the network rules are necessary to achieve these goals or, conversely, whether the rules increase the costs of networking without producing any real benefits. Paramount in such a determination is an exploration of the network/affiliate relationship as it stands today. As detailed in the next section, changes in the communications marketplace appear to have decreased to some extent the networks' ability to exercise undue influence over their affiliates to affect the flow of programming available to viewers.[12]

III. CHANGES IN THE MARKET FOR AFFILIATION

8. The Report on Chain Broadcasting based its recommendations on an analysis of three markets: "the market in which networks and stations meet advertisers, the market in which networks and stations meet listeners, and the intermediate or internal market where stations meet networks."[13] The Commission is considering the implications of changes in the video marketplace on the "market in which networks and stations meet advertisers" in another proceeding.[14] Additionally, we are conducting a similar analysis of the market in which networks and stations meet viewers in two other proceedings.[15] We therefore focus in

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[11] See 47 U.S.C. § 310(d).

[12] We note that in our recent proceeding regarding the financial interest and syndication rules, we concluded that whatever market advantage the networks once enjoyed has diminished to the point of no longer justifying restraints on the major networks' program financing, purchasing and syndication practices. In support of this conclusion, the Commission cited the decline in network audience share, the decline in the networks' share of advertising revenues and the decline in the networks' share of programming expenditures. Second Report and Order in MM Docket No. 90-162, 8 FCC Rcd 3282, 3303-04 (1993), as modified, Memorandum Opinion and Order, 8 FCC Rcd 8270 (1993).

[13] Report on Chain Broadcasting at 48.

[14] See Notice of Proposed Rule Making in MM Docket No. 95-90, FCC 95-226 (released June 14, 1995) (examines 47 C.F.R. § 73.658(h), the "network control of station advertising rates" rule and 47 C.F.R. § 73.658(i), the "network representation" rule).

[15] See Notice of Proposed Rule Making in MM Docket No. 94-123, FCC 94-266 (released Oct. 25, 1994) (review of 47 C.F.R. § 73.658(k), the prime time access rule) (PTAR Notice); Notice of Proposed Rule Making in MM Docket No. 91-221, FCC 94-322

this Notice upon the intermediate market where stations meet networks. We will, however, incorporate relevant comments from those other related dockets into this proceeding as appropriate.

9. As discussed above, the network/affiliate rules under present consideration were originally intended to reduce the barriers to entry by new networks and give stations control over the video programming they broadcast, so that incumbent networks could not unduly influence the "flow of programs from producers to listeners."[16] However, all of these rules were promulgated when terrestrial broadcasting was the only video connection to a consumer. This fact no longer holds true as there are several possible ways to reach a consumer, such as cable TV, direct broadcast satellite service and wireless cable. Such alternative pipelines offer multiple channels of video programming. Consequently, our rules regulating the broadcast television network/affiliate relations to promote the flow of programs from producers to viewers may no longer be necessary because of the video programming alternatives available to consumers.

10. Nonetheless, cable and other multichannel video programming distributors may not reach enough viewers that they sufficiently address our diversity and competition concerns with respect to the video marketplace. While cable systems are available to nearly 96% of all U.S. households, only 66.3% of those households (approximately 60.5 million) subscribe to cable services.[17] It is notable that the remaining 34% do not necessarily only receive terrestrial broadcast television signals; a number of these households subscribe to direct broadcast satellite television, wireless cable or another multichannel provider. At this point, we do not have accurate data on this issue. We accordingly solicit evidence regarding the extent to which those television households that do not subscribe to cable do subscribe to other multichannel providers.[18] We also ask for information regarding the broadcast networks' share of the viewing audience vis-a-vis other programming providers. Further,

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(released Jan. 17, 1995) (review of the Commission's TV multiple ownership rules) (TV Ownership Further Notice).

[16] Report on Chain Broadcasting at 48.

[17] Broadcasting & Cable, Apr. 17, 1995, at 73. This is based on a figure of 95.4 million total television households in the U.S.

[18] While it does not directly address these particular issues, a recent Commission Notice of Inquiry does ask a number of questions relevant to the more general consideration of the extent to which the availability of multichannel providers affects our analysis of the flow of programming to viewers through terrestrial broadcasting. See Notice of Inquiry in CS Docket No. 95-61, FCC 95-186 (released May 24, 1995) (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming). We will consider relevant comments submitted in that proceeding in our analysis of the video marketplace in this Docket as well, if warranted.

even if a substantial portion of households subscribe to video services other than over-the-air broadcasting, those non-broadcast video programming providers might not provide the kinds of services that would satisfy our traditional public interest objectives. To that end, we ask commenters to address whether multichannel video programming distributors provide sufficient local news and other programming responsive to community needs to satisfy the Commission's longstanding goal that the public receive these types of programming.

11. Even if we do not consider these multichannel programming sources in our analysis, we believe that changes in the broadcast industry itself may have significantly altered the network/affiliate relationship. For purposes of the following discussion, we will focus on network/affiliate relations in the broadcast television industry regardless of the proliferation of other providers. However, we seek comment on the effects these other providers have on the relationship between broadcast television networks and their affiliates.

A. Network/Affiliate Bargaining

12. The relative bargaining positions of broadcast television networks and their affiliates will be determined in part by the specific conditions of each local market served by broadcast television stations. One likely determinant of a broadcast network's bargaining power over an independently owned affiliate is the number of alternative outlets with which the network could choose to affiliate in the same market.[19] In this regard, Appendix B provides data on the number of commercial television stations per Designated Market Area (DMA). If we consider the four largest broadcast networks as currently competing with one another for affiliates and assume for the sake of argument that these networks have preferences for affiliating with VHF stations, then the networks would appear to have a commanding position in bargaining with broadcast television stations in only 4% of the DMA markets (serving 17% of television households in the U.S.). This is because in those markets the number of VHF broadcast stations exceeds the number of networks. This analysis excludes the recent entrants to national networking, United Paramount Network (UPN) and Warner Brothers Network. At this time, neither provides an amount of programming comparable to that of the four other broadcast networks. Commenters are, however, invited to address the extent to which these new entrants are affecting competition between networks for affiliates and therefore should be included in our analysis of network/affiliate relations.

13. The above analysis changes significantly if networks do not have strong preferences for VHF stations over UHF stations. The advantages to a network of a VHF affiliate over a UHF affiliate would appear to be significantly reduced if both are carried

[19] See B. Owen and S. Wildman, Video Economics 168-172 (1992) for a discussion of influences on network/broadcast television station bargaining over affiliation contracts.

over the same geographic region via cable.[20] There are 103 markets with more than four commercial television stations, including both VHF and UHF. These markets represent 49% of all DMA markets and 84% of all television households. Based on the analysis discussed above, the four major television networks may be in a better bargaining position than broadcast stations in such markets. This is not to say, however, that such a bargaining advantage constitutes undue market power and would have a sufficient effect on programming available to the public to justify governmental intervention. Taking into account new network entrants UPN and Warner Brothers, there are 44 DMA markets with more than six stations (serving approximately 59% of all television households). We ask commenters to discuss this analysis and, in particular, to address whether preferences for VHF stations continue to exert a strong influence on this bargaining.

14. The key determinant of the relative bargaining position of networks and broadcast television stations illustrated in the above discussion is the availability of alternatives. For affiliates, the critical issue is what are their alternatives for obtaining profitable programming. In contrast to when the network/affiliate rules were first applied to the broadcast television industry, there is now an array of new network and non-network sources of programming. This fact was noted in our recent PTAR Notice.[21] We ask for comment and analysis of what effects, if any, alternative programming sources, especially non-network sources, have had and will have on network/affiliate relations.

15. Further, the set of alternatives available to both parties is influenced by technology, which may be expected to change bargaining between networks and affiliates in the future in multiple ways. Perhaps the most significant technological change in terrestrial broadcasting's future is the possibility of a station multiplexing digital signals and thereby broadcasting more than one channel of programming. Such a development could reduce a network's bargaining power if the network becomes only one of several suppliers of programming for the station. On the other hand, the existence of more broadcast channels could increase competition between broadcasters for network affiliation to distinguish their products. We seek comment on whether we might exempt broadcast television stations from the network/affiliate rules if and when they broadcast multiple signals. We also seek examples of any other foreseeable technological changes that could affect network/affiliate relations in the near term.

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[20] The issue of VHF/UHF comparability is explored in the TV Ownership Further Notice at para. 119. We will consider comments from that proceeding to help us resolve this issue here. We also note that the Commission's ATV proceeding currently contemplates that all television broadcasters may eventually be moved to the UHF band. See, e.g., Memorandum Opinion and Order, Third Report and Order and Third Further Notice of Proposed Rule Making in MM Docket No. 87-268, 7 FCC Rcd 6924, 6935-37 (1992) (ATV Third Report and Further Notice).

[21] Notice of Proposed Rule Making in MM Docket No. 94-123, supra, note 1.

16. The network/affiliate relationship could also be affected by the trend toward group ownership in television broadcasting. Networks are often negotiating with group owners rather than individual station owners for affiliation contracts. In 1994, under the overall 12-station ownership limit, more than half (784 of 1,154) of all commercial U.S. television stations were owned by entities that held more than one TV station license. Group ownership may bolster an affiliate's bargaining position in that the network may bargain with a group owner over multiple affiliation contracts at once or over time. These possibilities force a network to recognize the effects that negotiating one affiliation contract with a group owner may have on other affiliation contracts that the network may want to negotiate with the group owner. We solicit comment on the impact of group ownership on the bargaining between networks and broadcast stations. Further, we request comment on the relative bargaining position of group versus single broadcast television station owners in negotiating affiliation agreements. We also ask commenters to provide data on the mix of individually-owned versus group-owned stations by DMA, and the extent to which group-owned stations tend to be network affiliates rather than independent stations.

17. If the Commission were to relax its national ownership limits for commercial broadcast television group ownership, as it has proposed in the TV Ownership Further Notice, then these changes would likely influence the relationships between broadcast networks and their affiliates. However, there appear to be two possible, and conflicting, effects of such a relaxation on network/affiliate relations. On the one hand, relaxation of the national ownership limits could increase the bargaining power of networks by expanding their option to own rather than affiliate with broadcast television stations. On the other hand, relaxation of the national ownership limits could increase the bargaining position of group-owned affiliates by creating larger, more powerful groups. We ask commenters to address how potential changes in the ownership rules will affect the network/affiliate dynamic with respect to the five rules reviewed in this Notice.

B. Effects of Network/Affiliate Bargaining on Other Parties

18. Network/affiliate bargaining affects both current and future viewers. It affects current viewers through an affiliate's contractual ability to provide its potential audience with the programming the audience wishes to view. It affects future viewers by restricting or facilitating entry by new broadcast television networks, which provide viewers with additional programming choices.

19. It is important to recognize that existing networks and their affiliates may agree to contracts that tend to make entry by new networks more difficult. Existing firms serving a common market compete not only among themselves but also with potential new entrants.[22] Consequently, existing networks will have an incentive to block entry by new networks in order to maintain their existing market positions. One way they might do so is to pay their

[22] See K. Basu, Lectures in Industrial Organization Theory 163 (1993).

affiliates sufficient compensation to accept long-term contracts that include contractual terms that limit entry.[23] While we consider this issue below with respect to specific contractual provisions, we solicit comment here on the effect of the length of the affiliation contract on the effectiveness of contractual devices in blocking entry by new networks. If the term of the contract is an important determinant, then we also ask commenters to address whether it might be appropriate to limit the length of affiliation contracts to mitigate these problems in light of whatever actions we might take regarding the five rules at issue here.[24]

IV. ANALYSIS OF SPECIFIC RULES

A. The Right to Reject Rule

20. Section 73.658(e) of the Commission's Rules, 47 C.F.R. § 73.658(e), prohibits a broadcast station from entering into a contract with a network that does not permit the station to (1) reject network programs that the station "reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest," or (2) substitute a program that the station believes to be of greater local or national importance. The Report on Chain Broadcasting concluded that stations must not be allowed to bargain away the right to reject programming because they are ultimately responsible under the Communications Act for the programming they air:

> We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory. [¶] Even after a licensee has accepted a network commercial program series, we believe he must reserve the right to substitute programs of outstanding national or local importance.

Report on Chain Broadcasting at 66.

21. The right to reject rule is therefore based on what we identified in Section II, supra, as goal number two -- to ensure that licensees retain sufficient control over their

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[23] See P. Aghion and P. Bolton, Contracts as a Barrier to Entry, 77 American Economic Review 388 (1987).

[24] The Commission's rules used to limit the duration of network affiliation agreements to two years. The Commission eliminated that limit in 1989 based on its belief that there is a significant public interest benefit to allowing networks and their affiliates, especially new networks and their affiliates, to choose the contractual duration best suited to their particular circumstances. See Report and Order in MM Docket No. 88-396, 4 FCC Rcd 2755 (1989).

stations to fulfill their obligation under the Communications Act to operate in the public interest. The Commission has traditionally interpreted this notion of control to mean that a licensee must preserve its ability to exercise full responsibility over all matters involving the operation of its station.[25] Our analysis of the continuing necessity of the right to reject rule must therefore balance the public interest requirement that licensees retain control of their stations with the health of the network/affiliate system.

22. Ensuring an affiliate an unlimited right to reject programming provided by a network enables an affiliate to pursue its short-term interests to the possible detriment of the network system within which it participates. An affiliate might reject network programming in favor of more profitable programming for the affiliate, ignoring the fact that its rejection of the network's program causes the network to lose advertising revenues. Losses in network advertising revenues imposed by affiliate preemption affect the network's ability to fund popular new programming and thus affects the future profitability of the network and all the affiliates. Further, such behavior by stations may induce networks to avoid innovative programming, because the network would bear most of the risk of airing such programming with affiliates sharing in the benefits only when it serves their interests. For these reasons, the Commission's 1980 Network Inquiry Report concluded that the right to reject rule increases the costs of networking and thereby reduces benefits to the public.[26] The public, and other affiliates, can be harmed if some affiliates reject network programming too often. We solicit evidence on these costs. We note, however, that it appears that affiliates generally do not reject network programming, at least in prime time.[27]

23. On the other hand, providing licensees with the right to reject network programming ensures that a licensee has the ability to respond to community needs, for

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[25] See, e.g., Daniel Forrestall, 8 FCC Rcd 884, 885 (MMB Video Services Division 1993); Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981); WHDH, Inc., 17 FCC 2d 856 (1969), aff'd 444 F.2d 841 (D.C. Cir. 1970), cert. denied 403 U.S. 923 (1971). It is permissible, however, for certain aspects of the day-to-day operation of a station to be delegated to third parties. See, e.g., Alabama Educational Television Commission, 33 FCC 2d 495, 508 (1972) (permits operation of station by agent if guided by policies set by the licensee).

[26] Network Inquiry Report, Volume I at 476.

[27] See, e.g., David Tobenkin, "Nets want clearance bang for buck," Broadcasting & Cable, November 7, 1994, at 20 (most shows, both daytime and prime time, on ABC, CBS and NBC are cleared in more than 95% of the U.S.; Fox's shows are cleared in more than 90% of the U.S.). We also note that Commission policy prohibits steeply graduated affiliate compensation plans whereby the amount of compensation a network pays an affiliate is heavily influenced by the amount of network programming taken by the affiliate in a way that would interfere with the affiliate's right to reject network programming. See CBS Network Compensation Plan, 1 RR 2d 696, 698 (1963).

example, to cover a late-breaking event of local importance. This concept of control also ensures that ultimate programming decisions are made by the same entity that has responsibility for rule violations. For example, if a licensee that is a network affiliate aired a network program that is later found to be indecent, the licensee and not the network would be responsible for any sanction the Commission might impose.

24. Notably, the rule is unclear as to whether a station, in invoking its Section 73.658(e) right to reject programming, may reject network programming for purely economic reasons. In a 1960 Report and Order slightly modifying the rule, the Commission was specifically asked by commenters to clarify "that the station's right to substitute for a network program must be based on bona fide public interest considerations rather than mere economic benefit to the station."[28] The Commission did not specifically state one way or the other whether the rule was intended to be limited in this way. Indeed, our review of some network affiliation agreements shows that a number of those agreements provide that an affiliate may not reject network programming based solely on the fact that that programming is low-rated and that the affiliate can make more money by preempting it and substituting a more profitable program.

25. We propose to retain the right to reject rule but to clarify that the rule may not be invoked based solely on financial considerations. We believe that this represents the most appropriate balance between the competing public interest and economic efficiency concerns inherent in the right to reject rule. We do not intend that this clarification be interpreted to mean that a station may only preempt network programming to air news or public affairs programming. We believe it appropriate to permit a station to reject network programming to air, for instance, a local sporting event or a local entertainment program. Further, the substituted programming would not necessarily have to be local. For example, an affiliate located near a nuclear power plant might prefer to air a syndicated program about nuclear accidents rather than network programming. In addition, we do not intend that the substitute programming must be less profitable than the network programming from the affiliate's point of view; profit, however, must not be the sole motive behind preemption. We seek comment on this proposal.

B. The Time Option Rule

26. Section 73.658(d) of the Commission's Rules, 47 C.F.R. § 73.658(d), prohibits arrangements between a station and a network whereby the network retains an "option" on certain hours of the station's time, which it may or may not decide to exercise. If the network chooses not to act on its option, the station is able to air other programming during the optioned time. In deciding to prohibit time optioning, the Report on Chain Broadcasting raised two concerns. First, the Commission stated its belief that time optioning interferes with a station's ability to build a regular audience for a particular program because that

[28] Report and Order in Docket No. 12859, 20 RR2d 1568, 1585 (1960).

program could be preempted by the network with, at best, minimal notice. The Commission concluded that this could hinder the development of local commercial programming contrary to the public interest. Second, the Commission found that time optioning could inhibit the development of new networks because it creates uncertainty as to the availability of network affiliates' time for the programming of another network.

27. Later, however, in its Supplemental Report on Chain Broadcasting, the Commission recognized the business convenience of time option arrangements.[29] It therefore decided to permit networks to acquire options in certain specified time periods, provided that the network gave the station at least 56 days' notice that it would be using the time. The Commission adopted the current, more restrictive rule in 1963 based on its conclusion that time optioning unduly restrains a station's freedom to choose what to air and when to air it and interferes with other program providers' access to broadcast time, without providing sufficient benefits to offset these concerns.[30]

28. A station's optioning of its time is a way of reserving broadcast time for use by another party. It is similar to a hotel reserving a room for a guest or an airline booking reservations for a passenger, with the potential customer being able to cancel his or her reservation. Essentially, the time optioning prohibition forces a network to commit to use particular blocks of a station's time rather than permitting a network to retain an option to use such time.

29. The prohibition on time optioning was based on both of the goals identified in Section II -- to remove barriers that would inhibit new networks and to ensure that licensees retain control over their stations so as to provide programming responsive to the public interest. However, the extent to which time optioning ever actually achieved its potential negative consequences is questionable. The Barrow Report, which recommended the prohibition on time optioning, found that networks as a rule did not use time optioning to force stations to clear programming they did not want to clear.[31] In fact, the Barrow Report argued that there was no difference in station clearance rates or practices with respect to network programming supplied to an affiliate for optional time (i.e., time a station optioned to a network) and station time (i.e., time the station had not optioned).[32]

30. While the Commission's prohibition on time optioning may not pose a significant impediment to established networks, it might inhibit the growth of new networks.

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[29] Supplemental Report on Chain Broadcasting (Oct. 1941), appeal dismissed sub nom. NBC v. United States, 47 F.Supp 940 (S.D.N.Y. 1942), aff'd, 319 U.S. 190 (1943).

[30] Second Report and Order in Docket 12859, 34 FCC 1103, 1127-28 (1963).

[31] Barrow Report at 296.

[32] Id. at 297, 307.

Established networks can commit to use specific blocks of a station's time in advance of its use because they have an inventory of programming. We note that in some network affiliation agreements, stations warrant that they have no obligations or conflicts with broadcasting the network's programming during specific time periods set out in the contract over the life of the contract (10 years), and promise to broadcast the network's programming in pattern with the network's owned and operated stations. A new network, however, may want to book a time slot with enough stations so that it can raise funding to develop a programming concept, but at the same time may want to retain the ability to opt out of those time slots if the program does not work out as expected. Thus, the new network may not be able to bear the risk of a pre-commitment to use a block of a station's time, but may need the option to use that time to develop a network programming schedule. We seek comment on the extent to which time optioning can be a useful device for new networks seeking to develop programming.

31. Further, we seek comment on the extent to which time optioning might impose a burden on network-affiliated stations. Because a station is responsible for what it broadcasts, it must be concerned with what programming the party optioning its time plans to provide. To retain control of what it broadcasts in optioned time, the station would appear to need enough time and information about the programming to discern whether it wants to accept the programming. Perhaps more importantly, the station would also need sufficient time to make arrangements with alternative programming suppliers or to produce its own programming in the event it chooses not to accept the network programming or the network decides not to exercise its option. The station would also need additional time to arrange for substitute advertising. Would eliminating the prohibition but adopting a mandatory notification period within which a network must decide whether to exercise its option alleviate concerns that time optioning would interfere with affiliates' long-range planning?

32. In light of the foregoing, we propose to modify our rules to permit stations to option time to networks, subject to a predefined notice period. We seek comment on this proposal and on what would be an appropriate notice period. Alternatively, we ask whether this rule should simply be eliminated. We note that even if networks are permitted to option affiliates' time, affiliates will still have the right to reject network programming provided during that time, as detailed in the previous section. If networks do not afford stations sufficient notice with respect to optioned time, however, stations may be effectively deprived of their ability to exercise that right. Should a distinction be drawn between established and newly developing networks with respect to their ability to engage in time optioning?

C. The Exclusive Affiliation Rule

33. Section 73.658(a) of the Commission's Rules, 47 C.F.R. § 73.658(a), prohibits arrangements between a station and a network that prevent the station from broadcasting the programming of another network. The Report on Chain Broadcasting adopted this prohibition based on the first goal identified in Section II. The Commission concluded that exclusive affiliation arrangements inhibit the development of new networks because they

prohibit stations affiliated with one network from taking the programming of another network. This could make it difficult for new networks to line up stations to air their programming, thus foreclosing competition and limiting the diversity of programming choices available to the public.

34. The extent to which exclusive affiliation could be used by networks to preclude entry by other networks is largely determined by the presence or absence of alternative outlets for new entrants, whether terrestrial broadcast or other. Large markets with a large number of broadcast television stations available for affiliation may not present the same potential for abuse that small markets with a small number of broadcast television stations present with respect to exclusive affiliation agreements. Given the substantial increase in the number of broadcast television stations since adoption of the Report on Chain Broadcasting (see Appendix C), it appears that there are a number of markets with enough broadcast television stations that elimination of the exclusive affiliation rule for these markets should not unduly restrict new network entrants. On the other hand, retaining the prohibition against exclusive affiliation could have benefits for new networks in that stations affiliated with an established network may be able to provide new networks with prominent airtime, thereby enhancing their potential to establish themselves. We seek comment on these issues.

35. We note that in at least a few markets, two recent national television network entrants have affiliated with stations that are also affiliates of ABC, CBS, NBC or Fox. Prior to the entry of UPN and Warner Brothers, only 23 out of 204 markets had stations affiliated with more than one network (whether national or regional), and almost all of these cases were in small markets with few stations. Now, however, some UPN and Warner Brothers stations have arranged for secondary affiliation in some sizeable markets.[33] Are these new entrants simply taking advantage of the potential for increased audience visibility associated with established national television network programming, or is there some other important reason for these dual affiliations? Is part of the reason that the new networks prefer to affiliate with VHF rather than UHF stations, and what does this say about the perceived UHF/VHF disparity?

36. There are benefits to exclusive affiliation. The standard economic efficiency argument in favor of exclusive dealing is that it reduces the problem of retailers taking advantage of a producer's promotion to bring in customers and then switching them to more

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[33] See, e.g., Joe Flint, "Station to Station," Variety, April 17, 1995, at 52 (notes that the Warner Brothers Network has secondary affiliations in Cleveland, Hartford, West Palm Beach, Providence and smaller markets; WB programming does not preempt other network programming on these stations but is "time-shifted" by the station in that it is shown wherever the station has room in its schedule).

profitable products for the retailers.[34] In the broadcasting context, an affiliate can use the audience drawn to the station's broadcasts by virtue of a network's programming and promotion of it to build an audience for programming it finds more profitable, at the network's expense. Permitting exclusive affiliation may reduce some of the concerns associated with the potential for affiliates to use the right to reject rule in this way. Further, identification with a given network through exclusive affiliation may be important to terrestrial broadcast stations attempting to differentiate themselves in an increasingly crowded video marketplace.

37. We propose to eliminate the current prohibition on exclusive affiliation, at least in large markets. We are concerned that permitting exclusive affiliation in smaller markets might preclude the development of new networks in those markets, thus depriving the public of the benefits of competition and diversity. On the other hand, as pointed out in Section III, supra, stations in small markets may be in a bargaining position to deny networks' exclusive affiliation if they believe that exclusive affiliation would force them to forgo potentially profitable programming opportunities. While it is conceivable that a network may offer an affiliate sufficient compensation that the affiliate will agree to such terms despite the potential loss of profitable alternatives,[35] it appears unlikely given the small audiences and profit potential these markets represent. We solicit comment on these issues. If we do retain the rule for small markets, how should such markets be defined?

D. Dual Network Rule

38. Section 73.658(g) of the Commission's Rules, 47 C.F.R. § 73.658(g), provides that a station may not enter into an agreement with a network that operates more than one broadcast TV network, except if the networks are not operated simultaneously or if there is no substantial overlap in the territories served by each network. The Report on Chain Broadcasting concluded that permitting an entity to operate more than one network might preclude new networks from developing and affiliating with desirable stations because those stations might already be tied up by the more powerful network entity. The Commission was also concerned that dual networking could give a network too much market power. The dual network prohibition therefore was intended to serve the first goal identified in Section II, as well as the Commission's more general diversity and competition goals.

39. In its 1992 TV Ownership Notice, the Commission specifically proposed to

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[34] See F. M. Scherer and D. Ross, Industrial Market Structure and Economic Performance (Boston: Houghton Mifflin Company, 3rd edition, 1990) at 558 et seq. for a discussion of the efficiency arguments for exclusive franchising, which is the type of exclusive dealing that applies in the current context.

[35] See P. Aghion and P. Bolton, Contracts as a Barrier to Entry, 77 American Economic Review 388 (1987).

repeal the dual network rule. The Commission observed that an increasing number of non-broadcast multiple channel providers who are not subject to such a rule are able to enjoy economies of scale and marketing advantages. Consequently, the Commission noted, broadcast networks affected by the rule are channeling their resources into non-broadcast media. Moreover, in light of the increase in the number of alternatives to broadcast television, the Commission predicted that repeal of the rule would pose little risk to the Commission's diversity goals. The Commission also stated that the advancement of satellite and digital compression technology could enable broadcasters to use their existing facilities to provide multiple channels, and that the dual network rule may forestall such innovation.[36]

40. A number of commenters in that proceeding favored repeal, arguing that the rule is outdated.[37] Other commenters offered alternative proposals, but agreed that some kind of modification is warranted.[38] Still others stated their belief that repeal might be worth considering in the future, but that such action would be premature at this time.[39] In opposition, commenters opposing repeal were concerned that permitting existing broadcasters to operate more than one network would limit the number of available outlets for independent program providers and would lead to undue concentration of advertising and programming distribution by existing networks.[40]

41. While we incorporate commenters' prior submissions into this proceeding, we believe it appropriate to seek further comment on eliminating the dual network rule. This is to permit commenters and the Commission to evaluate the rule in the context of our new

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[36] Notice of Proposed Rule Making in MM Docket 91-221, 7 FCC Rcd 4111, 4118 (1992) (TV Ownership Notice).

[37] See, e.g., ABC Comments at 19; CBS Comments at 34-37; NBC Comments at 31-34; Fox Comments at 9-10; INTV Comments at 28-29 (favored repeal, provided that the dual networks are considered one for purposes of fin-syn and PTAR).

[38] NTIA proposed, for example, applying the rule only to those entities meeting the fin-syn and PTAR definition of "network," which currently includes only ABC, CBS and NBC. NTIA would permit such networks to offer additional programming services as long as they do so using their affiliates' existing spectrum rather than by affiliating with additional stations. NTIA Comments at 29-30. In a petition for rule making attached to its comments, Press Broadcasting proposed an alternative that would permit broadcasters to air non-broadcast programming services on the additional channel that may be allotted them for a transition period in the ATV proceeding. See, e.g., ATV Third Report and Further Notice, supra note 20.

[39] See, e.g., NAB Comments at v; ABC Television Affiliates Comments at 1.

[40] See, e.g., MPAA Comments at 12; Malrite Comments at 8; Network Affiliated Stations Alliance at 19; Fisher Comments at 9.

proposals regarding the other network rules. In addition, we seek comment on the effects of technological advances that have occurred since 1992 that will facilitate digitization of the broadcast industry, and how the use of multiple channels by broadcasters would implicate the dual network rule.

42. As we discussed in Section III, supra, it appears that the increased number of broadcast TV stations and the reduced UHF/VHF distinction has led to greater opportunity for new networks to develop. Would permitting an entity to own more than one network reverse this trend, thereby impeding competition and diversity, or are there so many stations now that dual networking would not have a significant effect? We are particularly concerned that permitting merger of two or more of the existing major networks would lead to excessive concentration of market power. We seek comment on these issues.

43. We also seek comment on the cost of the prohibition; dual networking could allow the realization of economies of scale and scope for networks and affiliates and provide independent stations with an alternative programming stream. Further, we note that no dual network restriction applies to cable and direct satellite broadcasting. Does the dual network restriction impede broadcasters' ability to compete with these other media for viewers and advertisers? We note that concern that the dual network rule would impede advancement of advanced television (ATV) has led to our proposal in the ATV proceeding that the rule be suspended for ATV broadcasters.[41] Might we exempt broadcasters that multiplex digital signals, as suggested in Section III-A, supra? We also ask commenters to address the effects of our waiving the dual network rule for Univisa, Inc. and the Home Shopping Network.[42]

E. Network Territorial Exclusivity Rule

44. Section 73.658(b) of the Commission's Rules, 47 C.F.R. § 73.658(b), prohibits a station from entering into an agreement with a network that prevents (1) another station located in the same community of license from broadcasting those network programs not taken by the network affiliate; and (2) another station located in a different community of license from broadcasting any of the network's programs. The rule provides that it is permissible for a network affiliate to have the "first call" within its community on programming offered by the network.[43]

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[41] See ATV Third Report and Further Notice, supra note 20, at 6935-37.

[42] Applicability of 47 C.F.R. § 73.658(g) to Univisa, Inc., Memorandum Opinion and Order, 10 FCC Rcd 3764 (1995); Applicability of 47 C.F.R. § 73.658(g) and 47 C.F.R. § 658(k) to Home Shopping, Inc., Memorandum Opinion and Order, 4 FCC Rcd 2422 (1989).

[43] Similar rules for radio are included in Section 73.132 of the Commission's Rules, 47 C.F.R. § 73.132.

45. The first prong of the network territorial exclusivity rule was based on the Commission's finding in the Report on Chain Broadcasting that it is not in the public interest for the audience to be deprived of network programming when other stations in the community are ready and willing to carry it. The second prong was also adopted in response to the Report on Chain Broadcasting, although the Commission's rationale is less clear. It appears that this rule may have been adopted in response to certain practices of regional networks that the Commission determined were contrary to the public interest because they led to restraint of competition and compromised a licensee's ability to control its station.

46. The network territorial exclusivity rule differs from the other rules under consideration in this Notice in that it does not address network dominance over affiliates but instead involves the ability of one station to exclude another from obtaining network programming. Thus, this rule is more concerned with the competition between broadcast television stations for viewers and advertisers than the competition between networks for affiliates. As a consequence, the basis for the rule does not fit squarely into either of the goals identified in Section II but is premised on the Commission's more general objective of maximizing diversity and competition.

47. Exclusivity for an affiliate within a given geographic area, the first prong of the network territorial exclusivity rule, has both potential benefits and costs. On the one hand, it has been argued that territorial exclusivity can have anticompetitive effects and should be illegal unless there is a showing of efficiency gains.[44] On the other hand, territorial exclusivity can produce efficiency gains. For example, the standard efficiency argument for territorial exclusivity in other businesses is that it encourages retail outlets to invest in customer service and product promotion; otherwise, competing retailers selling the same manufacturer's product would benefit from one retailer's investments in these services. Similarly, one could argue that giving one affiliate territorial exclusivity with respect to the network's programming (i.e., its product) may encourage the affiliate to more vigorously promote the network's programming and provide more local services.

48. It appears to us that the potential costs of eliminating the first prong of the territorial exclusivity rule are negligible for two reasons. First, we observe that a number of affiliation agreements provide that, while an affiliate is to be the network's exclusive outlet in a defined area, the network reserves the right to terminate the affiliation agreement should the affiliate preempt its programming too frequently. Consequently, we question how frequently a network's programs are preempted and thereby offered to another station in the same community. Second, we observe that in a number of affiliation agreements, networks confer territorial exclusivity on their terrestrial broadcast station affiliates as against satellite

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[44] See P. Rey and J. Stiglitz, Vertical Restraints and Producers' Competition, 32 European Economic Review 561, 561-68 (1988); P. Rey and J. Stiglitz, The Role of Exclusive Territories in Producers' Competition (National Bureau of Economic Research Working Paper No. 4618, 1995).

and other delivery mechanisms. Network affiliates therefore have territorial exclusivity vis-a-vis other video programming providers but not vis-a-vis other broadcast stations. We accordingly propose to eliminate the first prong of the territorial exclusivity rule. We seek comment on this proposal.

49. Exclusivity for an affiliate outside a given geographic area, the second prong of the network territorial exclusivity rule, appears to us to confer no efficiency benefits but potentially significant costs. We can think of no benefit to the public that would arise from allowing a station to block the broadcast of network programming outside of its market. The detriment to the public can be significant, however, as viewers in a given area could be deprived of network programming, thus inhibiting competition and diversity. We seek comment on this issue. In this analysis, we have assumed that a station's community of license is coterminus with the geographic area in which an affiliate competes. This may not be true in many cases and so we solicit comment on whether we should extend the geographic area contemplated by the second prong of the territorial exclusivity rule to more closely approximate a station's market area, for example by modifying the rule to an affiliate's DMA or Grade B contour. We seek comment on such a modification and ask commenters to address whether it is preferable to refer to a station's DMA, Grade B contour or some other relevant geographical area.

50. In sum, we propose to eliminate the first prong and retain the second prong of territorial exclusivity prohibition, but modify the second prong to apply to a broader area than an affiliate's community of license.[45] We solicit comment on these proposals in light of the above discussion and any other issues that commenters see as pertinent to our determination of the costs and benefits of modifying this rule. We also seek comment on whether we should extend the geographic area contemplated by the first prong to be the same as the second prong in the event we decide to retain the first prong of the territorial exclusivity rule.

V. CUMULATIVE EFFECTS

51. Much of the above discussion has focused on the effects of relaxing one network/affiliate rule or another. We now consider the cumulative effects of the rule changes proposed in this Notice. To summarize, we have proposed to retain the right to

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[45] We note that there is an outstanding Commission proceeding that proposed to redefine the geographic boundaries of a number of related rules, including the network territorial exclusivity rule. See Further Notice of Proposed Rule Making in Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988). We also note that the rule originally applied within a station's "service contour" and was later modified to apply within a station's community of license. See Amendment of Section 3.658(b) of the Commission's Rules and Regulations, 12 RR 1537 (1955).

reject rule as clarified to eliminate financial considerations as a sole justification for program rejection, to modify the time option rule to permit time option agreements if they contain an appropriate deadline for invoking the option, to eliminate the exclusive affiliation rule, at least in large markets, to eliminate the first prong of the network territorial exclusivity rule (prohibiting exclusivity on rejected programs vis-a-vis other stations in the same community), and to retain the second prong of the rule. While we did not reach tentative conclusions about the continuing need for the dual network rule, we have asked a series of pointed questions designed to evaluate that rule's costs and benefits.

52. Changes to the first three rules listed above must be carefully coordinated, because these rules have a common focus and are closely interrelated. The Network Inquiry Report observed that the right to reject, time option and exclusive affiliation rules all regulate the restraints a network may impose on its affiliates' program choices.[46] In proposing to retain the first one -- the right to reject rule -- we intend to preserve the most explicit protection of an affiliate's control over program choice. Thus, our proposal recognizes that a network should not be permitted to control an independently owned affiliate's programming to the same extent that the network controls programming on its owned and operated stations. In seeking comment on the cumulative effects of our proposals, one of the primary questions, then, is whether modification of the time option rule and elimination of the exclusive affiliation rule would undercut the explicit protections left by the right to reject rule. In other words, would a network be able to control, for all practical purposes, the programming of its affiliates through time optioning and exclusive affiliation agreements? If so, how likely is such behavior to occur?

53. Another fundamental question on cumulative effects is whether our proposals for the first three rules would have any significant effect on the dynamics of the network/affiliate relationship that has evolved under our current rules. By comparing the current programming practices of network owned stations and those of independently owned affiliates, we may be able to discern whether the safeguards now embodied by the right to reject, time option and exclusive affiliation rules have produced a measurable degree of programming autonomy on the part of the independently owned affiliates. We ask commenters to submit studies setting forth such a comparison. Once we have information on the type and degree of autonomous affiliate behavior, we will be in a better position to assess the relative value of each of these rules, how they act in concert and whether our proposals as a whole would yield results that would best serve the public interest.

54. The fourth rule -- which restricts dual networking -- can be viewed as a companion to the exclusive affiliation rule. Designed to reduce a network's ability to block entry by new networks, the dual network rule prohibits a station from affiliating with an entity that operates two networks; the rule thus limits the barriers to entry that new networks face in seeking to affiliate with broadcast stations. The exclusive affilation rule also

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[46] Network Inquiry Report, Vol. I at 475.

encourages opportunities for other networks by prohibiting a station from agreeing with any one network not to deal with others. If there is a current need for protections along these lines, we must assess the overall effects of eliminating one or both of these rules. Accordingly, we ask commenters to discuss the cumulative effect on the entry opportunites for new networks of changing the rules at issue here.

55. The fifth rule -- the network territorial exclusivity rule -- limits a station's ability to block network programming through an alternative broadcast outlet. As we stated above, in proposing to eliminate the prong of the rule that prevents a station from contracting for full program exclusivity within its market, we intend to provide balance to our proposal to eliminate the exclusive affiliation rule. Thus, an affiliate would not be placed in the position of negotiating with a network over an exclusive affiliation provision -- which would restrict the station to dealing with only one network -- while being prevented by regulation from seeking full programming exclusivity rights vis-a-vis the station's direct broadcast competitors.

56. We ask commenters to address any other interactions between our proposal for the network territorial exclusivity rule and those for the others. For example, our proposal to retain the second prong of the rule may have relevance to our proposals for the rules that were designed to encourage the development of new networks -- the time option rule, the exclusive affiliation rule and the dual network rule. This is because a station would not, in negotiations with a new network, be permitted to expand demands for exclusivity beyond the station's market and thereby impede that network's ability to develop an adequate affiliate base. If this assessment is accurate, concern that other proposed changes in our rules will reduce protection for new networks could be alleviated to some degree by our proposal to retain the second prong of the network territorial exclusivity rule.

57. Finally, we welcome any additional comment regarding the cumulative effect of our proposals on consumer welfare generally, and on the historical foci of the rules at issue here -- i.e., the development of new broadcast networks and licensee control over station operations. With respect to consumer welfare, we note that there has been some discussion in the academic literature that identifies a correlation between the types of restraints on exclusivity and their cumulative effects on consumer welfare.[47] For example, one publication asserts that, in certain settings, the ability to enter into exclusive dealing arrangements with mutiple parties in the same market, coupled with the opportunity to reach territorial exclusivity agreements, may reduce consumer welfare.[48] We ask commenters to address these theories, as applied to the broadcasting industry.

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[47] See T. Gabrielsen and L. Sorgard, Vertical Restraints and Interbrand Competition (Center for Economic Studies, University of Munich, Working Paper No. 77).

[48] See id.

VII. CONCLUSION

58. We have attempted in this Notice to consider the practical effects of our network/affiliate programming rules on the modern broadcast television industry and, in turn, on the viewing public. The rules under review in this proceeding were initially adopted when families gathered around the radio and tuned in the local AM station for information and entertainment. Even the most forward-thinking FCC could not have imagined that viewers would be afforded the multitude of video programming choices available today, let alone the number of alternatives that may be available in the near term if and when new technologies such as digital broadcasting become market realities.

59. To ensure that free, over-the-air television remains a viable programming source in the years to come, we believe it imperative to review how we regulate the broadcasting industry and to remove unnecessary regulatory restraints. As we have discussed in this Notice, it appears that some of the network/affiliate rules no longer serve the goals they were intended to fulfill. Indeed, some of the rules may now operate to inhibit development of new broadcast networks and discourage innovation, which is the opposite effect than was intended when the rules were adopted more than 50 years ago. Further, it appears that some of the rules increase the costs of networking. This could significantly impair broadcasters' ability to compete with non-broadcast media, thus limiting diversity by reducing programming choice.

60. Nonetheless, the programming provided by the major broadcast networks continues to attract a significant number of viewers. Our regulations must therefore be sufficiently fluid to serve the needs of the ever-changing video marketplace and at the same time ensure that networks and affiliates do not enter into agreements that would threaten the Commission's diversity and competition goals, which benefit the public interest. We enlist commenters' aid in achieving this balance.

VII. ADMINISTRATIVE MATTERS

61. Ex Parte Rules -- Non-Restricted Proceeding. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules. See 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

62. Comment Information. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before August 28, 1995, and reply comments on or before September 27, 1995. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine

copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

63. Initial Regulatory Flexibility Analysis. See Appendix.

64. Additional Information. For additional information regarding this proceeding, contact Jane Hinckley Halprin at (202) 776-1653 or Robert Kieschnick at (202) 739-0764.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
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